

State of Wisconsin



2009 Senate Bill 672

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2009 WISCONSIN ACT 292

AN ACT *to amend* 103.005 (10); and *to create* 103.06 of the statutes; **relating to:** compliance by employers with certain laws whose enforcement depends on the proper classification of persons as employees or nonemployees and providing penalties.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 103.005 (10) of the statutes, as affected by 2009 Wisconsin Act 3, is amended to read:

103.005 (10) Except as provided in ss. 103.06 (5) (d), 103.275 (2) (bm) and (br), 103.34 (10) (b) and (c), 103.91 (4) (b) and (c), 103.92 (6) and (7), 104.07 (5) and (6), and 105.13 (2) and (3), orders of the department under chs. 103 to 106 shall be subject to review in the manner provided in ch. 227.

SECTION 2. 103.06 of the statutes is created to read:

103.06 Worker classification compliance. (1)

DEFINITIONS. In this section:

(a) "Business day" means any day on which the offices of the department are open.

(b) "Employee" means any of the following who is employed by an employer:

1. For purposes of compliance with the requirement specified in sub. (3) (a) 1., an employee, as defined in s. 103.001 (5).

2. For purposes of compliance with the requirement specified in sub. (3) (a) 2., an employee, as defined in s. 102.07.

3. For purposes of compliance with the requirement specified in sub. (3) (a) 3., an employee, as defined in rules promulgated under s. 103.05.

4. For purposes of maintaining records under sub. (3) (a) 4. as required under rules promulgated under s. 103.02, an employee, as defined in s. 103.001 (5).

5. For purposes of maintaining records under sub. (3) (a) 4. as required under rules promulgated under s. 104.04, an employee, as defined in s. 104.01 (2).

6. For purposes of listing deductions from wages under sub. (3) (a) 4. as required under s. 103.457, an employee, as defined in s. 103.001 (5).

7. For purposes of compliance with the requirement specified in sub. (3) (a) 5., an employee, as defined in s. 108.02 (12).

(c) "Employer" means any of the following that is engaged in the work described in s. 108.18 (2) (c):

1. For purposes of compliance with the requirement specified in sub. (3) (a) 1., an employer, as defined in s. 103.001 (6).

2. For purposes of compliance with the requirement specified in sub. (3) (a) 2., an employer, as defined in s. 102.04.

3. For purposes of compliance with the requirement specified in sub. (3) (a) 3., an employer, as defined in rules promulgated under s. 103.05.

4. For purposes of maintaining records under sub. (3) (a) 4. as required under rules promulgated under s. 103.02, an employer, as defined in s. 103.01 (1).

* Section 991.11, WISCONSIN STATUTES 2007-08 : Effective date of acts. "Every act and every portion of an act enacted by the legislature over the governor's partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication as designated" by the secretary of state [the date of publication may not be more than 10 working days after the date of enactment].

5. For purposes of maintaining records under sub. (3) (a) 4. as required under rules promulgated under s. 104.04, an employer, as defined in s. 104.01 (3).

6. For purposes of listing deductions from wages under sub. (3) (a) 4. as required under s. 103.457, an employer, as defined in s. 103.001 (6).

7. For purposes of compliance with the requirement specified in sub. (3) (a) 5., an employer, as defined in s. 108.02 (13).

(2) WORKER CLASSIFICATION COMPLIANCE; DUTIES OF DEPARTMENT. For purposes of promoting and achieving compliance by employers with the laws specified in sub. (3) (a) through the proper classification of persons performing services for an employer as employees and nonemployees, the department shall do all of the following:

(a) Educate employers, employees, nonemployees, and the public about the proper classification of persons performing services for an employer as employees and nonemployees.

(b) Receive and investigate complaints alleging violations of the requirements specified in sub. (3) (a), or investigate any such alleged violations on its own initiative, and, if the department finds that an employer is in violation of a requirement specified in sub. (3) (a), order the employer to stop work and pay a forfeiture as provided under sub. (5).

(c) Refer complaints of misclassification of employees as nonemployees to other state or local agencies that administer laws whose enforcement depends on the proper classification of employees.

(d) Cooperate with other state or local agencies in the investigation and enforcement of laws whose enforcement depends on the proper classification of employees.

(e) Appoint attorneys licensed to practice in this state as appeal tribunals to conduct hearings and issue decisions under sub. (6) (b).

(3) COMPLIANCE REQUIREMENTS. (a) For purposes of ensuring that an employer is properly classifying the persons performing services for the employer as employees and nonemployees, the department may require an employer to prove all of the following:

1. That the employer is maintaining records identifying all persons performing work for the employer, including the name, address, and social security number of each of those persons.

2. That the employer is maintaining worker's compensation coverage for its employees as required under s. 102.28 (2).

3. That the employer has provided to the department the information required under s. 103.05 with respect to each newly hired employee of the employer.

4. That the employer is maintaining records of the hours worked by its employees, the wages paid to those employees, any deductions from those wages, and any other information that the employer is required to keep under rules promulgated under s. 103.02 or 104.04, and

is listing deductions from wages as required under s. 103.457.

5. That the employer is in compliance with ch. 108.

(b) Any agreement between an employer and employee purporting to waive or modify any requirement under par. (a) is void.

(4) COMPLIANCE INVESTIGATIONS. (a) The department may conduct investigations to ensure compliance with the requirements specified in sub. (3) (a). In conducting an investigation, the department may do any of the following:

1. Enter and inspect any place of business or place of employment and examine and copy any records that the employer is required to keep under rules promulgated under s. 103.02 or 104.04; any books, registers, payroll records, records of wage withholdings, records of work activity and hours of work, and records or indicia of the employment status of persons performing work for the employer; and any other records relating to compliance with the requirements specified in sub. (3) (a).

2. Determine the identity and activities of any person performing work at any location where the work described in s. 108.18 (2) (c) is being performed.

3. Interview and obtain statements in writing from any employer or person performing work or present at any location where the work described in s. 108.18 (2) (c) is being performed with respect to the names and addresses of persons performing work for the employer, the payment of wages to and hours worked by those persons, and any other information relating to the remuneration of those persons and the nature and extent of services performed by those persons.

(b) The department may conduct the activities under par. (a) 1. to 3. at any location where the work described in s. 108.18 (2) (c) is performed by or for an employer. In addition, the department may conduct the activities specified under par. (a) 1. at any other location where the records specified in par. (a) 1. are maintained by an employer or an agent of an employer.

(c) If in the course of an investigation of an employer the department determines that there is reason to believe that the employer is not the prime contractor of the work being performed by or for the employer, the department shall seek to determine the identity of the prime contractor. If the department identifies any person other than the employer that it believes to be the prime contractor of the work being performed, the department, for informational purposes, shall serve on that person copies of any notices or orders served on the employer under sub. (5) with respect to the work. Failure of the department to serve a copy of a notice or order under sub. (5) on a person believed to be a prime contractor does not relieve the employer from any liability arising out of the notice or order or impair the department from pursuing any remedy relating to the notice or order.

(5) STOP WORK ORDERS AND CIVIL PENALTIES. (a) If after an investigation under sub. (4) the department determines that an employer has failed to demonstrate compliance with any of the requirements specified in sub. (3) (a), the department may serve on the employer a notice of the department's intent to issue an order requiring the employer to stop work at the locations specified in the notice. The notice shall advise the employer that the order will be issued within 3 business days after the date of the notice unless within those 3 business days the employer provides information satisfactory to the department indicating that the employer is in compliance with the requirements specified in sub. (3) (a) at each location specified in the notice.

(b) If within 3 business days after service of a notice under par. (a) an employer does not demonstrate compliance with the requirements listed under sub. (3) (a) with respect to a location specified in the notice, the department may serve an order on the employer requiring the employer to stop work at the locations specified in the order. The order shall advise the employer that the employer may request a hearing on the order under sub. (6) (a), describe how the employer may request a hearing, and be accompanied by a form for requesting a hearing. The order shall take effect as provided in the order and shall remain in effect until the employer provides evidence satisfactory to the department that it is in compliance with the requirements under sub. (3) (a) and pays the forfeiture under par. (c).

(c) An employer that does not stop work as required under an order under par. (b) may be required to forfeit \$250 for each day beginning on the day on which the order is served and ending on the day on which the employer provides evidence satisfactory to the department that it has stopped work as required under the order or is in compliance with sub. (3) (a), whichever occurs first.

(d) An order under this subsection is final unless appealed under sub. (6). An order under this subsection is subject to review only as provided in sub. (6) and not as provided in ch. 227.

(6) APPEAL OF STOP WORK ORDER AND CIVIL PENALTY. (a) Any employer that is aggrieved by an order to stop work under sub. (5) (b) may appeal the order by filing with the department a written request for a hearing to review the order within 10 days after service of the order. If a request for a hearing is filed within those 10 days, the department shall hold the hearing within 14 days after receipt of the request. The order to stop work shall be automatically stayed from the filing of the request for a hearing until the date on which a decision on the appeal is issued under par. (b). Notwithstanding the stay of the order to stop work, the forfeiture under sub. (5) (c) shall continue to accrue as provided in sub. (5) (c).

(b) 1. The hearing shall be held before an appeal tribunal and shall be conducted in the manner described in

s. 108.09 (5). Within 7 days after the hearing, the appeal tribunal shall issue a decision in writing affirming, reversing, or modifying the order to stop work and forfeiture.

2. If the appeal tribunal finds that the employer has at all times been in compliance with the requirements specified in sub. (3) (a), the appeal tribunal shall reverse the order to stop work and forfeiture.

3. If the appeal tribunal finds that the employer has not complied with the requirements specified in sub. (3) (a), the automatic stay under par. (a) shall be lifted and the order to stop work shall remain in effect until the employer provides evidence satisfactory to the department that the employer is in compliance with the requirements specified in sub. (3) (a) and pays the forfeiture under sub. (5) (c).

4. A decision of an appeal tribunal under this paragraph is final unless a review of the decision is requested under par. (c). A decision of an appeal tribunal under this paragraph is subject to review only as provided in par. (c) and not as provided in ch. 227.

(c) The employer or the department may request a review of an appeal tribunal's decision by petitioning the commission for review of the decision within 21 days after the decision was mailed to the employer's last-known address. The commission shall conduct the review in the manner described in s. 108.09 (6). An order to stop work that is in effect under par. (b) 3. shall remain in effect as provided in par. (b) 3. during the pendency of a review under this paragraph. A decision of the commission under this paragraph is final and the provisions of s. 108.10 (6) and (7) shall apply to the decision unless judicial review of the decision is requested under par. (d). A decision of the commission under this paragraph is subject to judicial review only as provided in par. (d) and not as provided in ch. 227.

(d) The employer or the department may commence an action for the judicial review of a decision of the commission under par. (c) within 30 days after the decision was mailed to the employer's last-known address. The scope of judicial review under this paragraph, and the manner of that review insofar as is applicable, shall be the same as that provided in s. 108.09 (7). An order to stop work that is in effect under par. (b) 3. shall remain in effect as provided in par. (b) 3. during the pendency of a review under this paragraph.

(e) In addition to any forfeiture for which the employer may be liable under sub. (5) (c) and any other penalty for which the employer may be liable for a violation of a requirement specified in sub. (3) (a), any employer that violates a final order to stop work of the department under sub. (5) (b) or final decision of an appeal tribunal, the commission, or a court affirming such an order under par. (b), (c), or (d) is subject to a forfeiture of \$1,000 for each day of violation. An employer may seek review of a forfeiture imposed under this para-

graph in the same manner as an order to stop work is reviewed under pars. (a) to (d).

(7) OTHER ENFORCEMENT ACTION NOT PRECLUDED. An investigation, order, or decision under sub. (4), (5), or (6) does not preclude or otherwise impair or affect any other action that is required or permitted to enforce a requirement under this chapter or under ch. 101, 102, 104, 108, 109, or 111, including any investigation, order, or decision; any civil or criminal action or administrative proceeding; or any obligation for any payment, reimbursement, assessment, surcharge, forfeiture, or other remedy or penalty under any of those chapters.

(8) RECOVERY OF UNPAID FORFEITURES. (a) If an employer fails to pay a forfeiture imposed under sub. (5) (c) or (6) (e), the department has a perfected lien upon the employer's right, title, and interest in all of its real and personal property located in this state in the amount finally determined to be owed, plus costs. Except when creation of a lien is barred or stayed by bankruptcy or other insolvency law, the lien is effective when the stop work order or decision affirming the stop work order becomes final and shall continue until the amount owed, plus costs and interest to the date of payment, is paid. The employer shall pay interest on the amount owed at the rate of 1 percent per month or fraction of a month from the date on which the amount became due. If a lien is initially barred or stayed by bankruptcy or other insolvency law, the lien shall become effective immediately upon expiration or removal of the bar or stay. The perfected lien does not give the department priority over any lienholders, mortgagees, purchasers for value, judgment creditors, or pledges whose interests have been recorded before the lien of the department is recorded.

(b) 1. If an employer fails to pay to the department any amount found to be due the department in proceedings under this section and if no proceeding for review is pending and the time for taking an appeal or review has expired, the department or any authorized representative of the department may issue a warrant directed to the clerk of circuit court for any county of the state. The clerk of circuit court shall enter in the judgment and lien docket the name of the employer mentioned in the warrant and the amount of the forfeiture, interest, costs, and other fees for which the warrant is issued and the date when the warrant is entered. A warrant so entered shall be considered in all respects to be a final judgment constituting a perfected lien upon the employer's right, title, and interest in all real and personal property located in the county where the warrant is entered. The lien is effective when the department issues the warrant and shall continue until the amount owed, including interest, costs, and other fees to the date of payment, is paid. After a warrant is entered in the judgment and lien docket, the department or any authorized representative of the department may file an execution with the clerk of circuit court for filing by the clerk of circuit court with the sheriff of any county where

real or personal property of the employer is found, commanding the sheriff to levy upon and sell sufficient real and personal property of the employer to pay the amount stated in the warrant in the same manner as upon an execution against property issued upon the judgment of a court of record, and to return the warrant of the department and pay to the department the money collected by virtue of the execution within 60 days after receipt of the warrant.

2. The clerk of circuit court shall accept, file, and enter each warrant, satisfaction, release, or withdrawal under this subsection in the judgment and lien docket without prepayment of any fee, but the clerk of circuit court shall submit a statement of the proper fee semi-annually to the department covering the period from January 1 to June 30 and July 1 to December 31 unless a different billing period is agreed to between the clerk of circuit court and the department. The fees shall then be paid by the department, but the fees provided by s. 814.61 (5) for entering the warrants shall be added to the amount of the warrant and collected from the employer when satisfaction or release is presented for entry.

(c) When the penalties set forth in a warrant together with interest and other fees to the date of payment and all costs due the department have been paid to the department, the department shall issue a satisfaction of the warrant and file that satisfaction with the clerk of circuit court. The clerk of circuit court shall immediately enter a satisfaction of the judgment on the judgment and lien docket. The department shall send a copy of the satisfaction to the employer.

(d) If the department finds that the interests of the state will not be jeopardized, the department, upon such conditions as it may exact, may issue a release of any warrant with respect to any real or personal property upon which the warrant is a lien or cloud upon title. The clerk of the circuit court shall enter the release upon presentation of the release to the clerk and payment of the fee for filing the release and the release shall be conclusive proof that the lien or cloud upon the title of the property covered by the release is extinguished.

(e) If the department issues an erroneous warrant, the department shall issue a notice of withdrawal of the warrant to the clerk of circuit court for the county in which the warrant is filed. The clerk shall void the warrant and any liens attached by the warrant.

(9) LEVY FOR DELINQUENT FORFEITURES. If any employer who is liable for any forfeiture under sub. (5) (c) or (6) (e) neglects or refuses to pay that forfeiture after the department has made demand for payment, the department may collect that forfeiture and expenses of the levy by levy upon any property belonging to the employer. Section 108.225 applies to a levy under this subsection except as follows:

(a) For purposes of a levy under this subsection, "debt" as used in s. 108.225 means a delinquent forfeiture

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under sub. (5) (c) or (6) (e) or any liability of a 3rd party for failure to surrender to the department property or rights to property subject to levy after proceedings under ss. 108.10 and 108.225 to determine that liability.

(b) Section 108.225 (16) (a) and not s. 108.225 (16)

(am) applies to a levy under this subsection.

SECTION 3. Effective date.

(1) WORKER CLASSIFICATION COMPLIANCE. This act takes effect on January 1, 2011.
